COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts	)	D.T.E. 01-20

MOTION OF VERIZON MASSACHUSETTS TO ESTABLISH PROCEDURES FOR THE IDENTIFICATION AND ENTRY OF EVIDENCE

Verizon Massachusetts ("Verizon MA") submits this Motion to Establish Procedures for the Identification and Entry of Evidence, pursuant to 220 C.M.R. § 1.04(5), to facilitate the proper marking and introduction of exhibits that may be entered into evidence in this proceeding. In similar complex proceedings before the Department (using comparable ground rules), parties traditionally have been permitted to mark for identification as exhibits all prefiled testimony and all responses to information requests produced during the discovery phase of the investigation. At the close of hearings, all such information is then routinely admitted into evidence, subject to objections by parties on individual exhibits and a ruling by the Department to exclude particular documents.

During a telephone procedural conference conducted by the hearing officer shortly before the beginning of evidentiary hearings, counsel for Verizon MA indicated that it intended to follow the Department's normal practice and move into evidence the

responses to information requests filed by all parties. Counsel for AT&T indicated that AT&T objected to this practice and would raise a general objection to the admission of responses to information requests. Verizon MA seeks a Department order that its normal procedures with respect to the identification and admissibility of all discovery responses as exhibits (subject to specific evidentiary objections) be established in this case.

ARGUMENT

This case includes a voluminous and complex body of prefiled testimony and cost studies concerning the appropriate pricing for unbundled network services ("UNEs"), submitted by both Verizon MA and other parties. Although substantial effort has been invested in the development of this testimony, the Department's discovery rules provide the opportunity for all parties to submit information requests for the purpose of obtaining clarification and further understanding of the facts and assumptions underlying each witness's testimony. Such information is critical for all parties, as well as the Department, to develop a more complete record to be used by the Department in formulating its decision in the case.

Recognizing the value of a thorough and complete record to the Department in ruling on complex investigations, the Department historically has allowed the marking and introduction into evidence of all discovery responses, absent a sustainable objection (*e.g.*, unfair prejudice caused by a party's inability to conduct cross examination on the discovery response).[1] Verizon MA is unaware of any recent Department precedent for allowing a broad, *a priori* objection to entering into evidence responses to information

[1] In *MFS-McCourt, Inc.*, D.P.U. 88-229/252, at 9 (1989), the Department allowed inclusion of late-filed exhibits in the record even though the opposing party had not been given the opportunity to cross-examine the new evidence because no prejudice to the moving party would result from the admission. D.P.U. 94-50, at 60.

requests. *Verizon Alternative Regulation Plan*, D.T.E. 01-31 (all responses to information requests admitted into evidence without objection (Tr. 4, at 742-743) using same ground rules originally established in D.T.E. 01-20); *Consolidated Arbitrations*, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 ("*Consolidated Arbitrations*") (Department allows all discovery responses entered into the record as evidence) (*see, e.g.*, *Arbitrator Memorandum to Parties in Consolidated Arbitration Proceeding*, dated November 19, 1996); *MediaOne Telecommunications of Mass, Inc. and New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts*, D.T.E. 99-42/43, 99-52, at 3, fn.6 (1999) (Department allows all discovery responses in a complex arbitration case entered into the record as evidence); *Tariff No. 17 Order*, D.T.E. 98-57 (2000) (Department allows all discovery responses in a complex tariff case entered into the record as evidence); *The Berkshire Gas Company*, D.T.E. 01-56 (Department allows all discovery responses entered into the record as evidence in gas distribution company rate case (Tr. 17, at 1987)); *Boston Edison Company/Cambridge Electric Light Company and Commonwealth Electric Company*, D.T.E. 99-19 (1999) (Department allows all discovery responses in merger-related rate plan proceeding entered into the record as evidence (Tr. 10, at 1276-1290)); *Eastern Enterprises/Essex County Gas Company Merger*, D.T.E. 98-27 (1998) (Department allows all discovery responses entered into the record in a merger proceeding as evidence (Tr. 4, at 12-131)); *Eastern Enterprises and Colonial Gas Company*, D.T.E. 98-128 (1999) (Department allows all discovery responses entered into the record in a merger proceeding as evidence (Tr. 9, at 1216)); *North Attleboro Gas Company/Providence Energy Corporation*, D.T.E. 00-26 (2000) (Department allows all discovery responses entered into the record in a merger

proceeding as evidence (Tr. 1, at 117)); *Fall River Gas Company/Southern Union Company*, D.T.E. 00-25 (2000) (Department allows all discovery responses entered into the record in a merger proceeding as evidence (Tr. 1, at 117)).

Notably, in the UNE pricing proceeding, which is the predecessor to the case now before the Department, *Consolidated Arbitrations*, Phase 4 (1996), the Department admitted all discovery responses (as well as prefiled testimony and responses to record requests) into evidence. *See Arbitrator Memorandum to Parties in Consolidated Arbitration Proceeding*, dated November 19, 1996, *Consolidated Arbitrations*. The Department also adopted the same evidentiary procedure in the Non-Recurring Cost case, *Consolidated Arbitrations*, Phase 4-L (1999) (Tr. 41, at 21).

AT&T recently sought to strike portions or entire responses of certain Verizon MA information responses that had already been admitted into the record at the end of the hearing process, arguing that Verizon MA used the information responses to provide self-serving and non-responsive answers. *Tariff No. 17 Order*, D.T.E. 98-57 (2000). In ruling on AT&T's motion, the Hearing Officer stated that she could find nothing in the case to suggest that the Department intended to deviate from its procedures that allow a party to mark and move discovery responses into evidence. Instead, the Hearing Officer unequivocally denied AT&T's request, stating:

> Nothing in the Department's governing policies and procedures prohibits a party from marking, and moving into evidence, its own responses to pre-trial discovery.

Hearing Officer Ruling Denying AT&T's Motion to Strike Certain Bell Atlantic Exhibits, D.T.E. 98-57, at 2-4 (February 9, 2000) ("Hearing Officer Ruling"). Noting that Verizon

MA's complete exhibit list was presented to the parties approximately one month earlier, the Hearing Officer stated that:

> AT&T did not avail itself of the opportunity to cross examine Verizon MA's witnesses on any answer that AT&T now characterizes as self-serving or non-responsive. Furthermore, AT&T makes only a general claim that the exhibits identified contain self-serving and non-responsive answers to pre-trial discovery.

Id. The Hearing Officer did not consider any of the answers to be so objectionable as to warrant striking, but indicated only that each exhibit would be given its due weight by the Department. *Id*.

In this proceeding, the vast majority of the responses to information requests were provided in advance of each round of testimony in order to afford the parties the opportunity to present responsive evidence in pre-filed testimony. In addition, parties will have the opportunity to cross-examine witnesses on the substance of their responses. Given the Department's long-standing procedure that routinely permits admission of such responses into evidence at the close of hearings, there is no prejudice to parties, who are fairly on notice that such responses will be made part of the evidentiary record in the case. In fact, in order to establish the most thorough and comprehensive record in complex cases, the Department in this case should continue its clear and unequivocal practice of allowing all responses to discovery to be marked and moved into the record as evidence (absent the granting of a substantive objection).

The Ground Rules established by the Hearing Officer in this case do not limit the number of exhibits, or in any way, suggest that responses to discovery are not properly admissible as evidence. To the contrary, it is late-filed exhibits only, which would not be

subject to cross-examination or rebuttal that labor under a heavy burden before being admissible into the record. The Ground Rules state, in relevant part:

> Late-Filed Exhibits
>
> Exhibits offered after the close of the hearings, if objected to by any party, labor under a heavy burden of untimeliness, for they would not be subject to cross-examination or rebuttal. Late filed exhibits must be accompanied by a motion to reopen the record and supported by appropriate affidavits. Only for good cause shown, in the face of an objection, will such exhibits be marked and admitted into evidence.

See, e.g., Hearing Officer Memorandum Re: Supplemental Ground Rules at 5, D.T.E. 01-20 (January 4, 2002**)**. There are no constraints, *a priori*, on the introduction into evidence of all responses to information requests.

CONCLUSION

There is nothing unique or special about this case to cause the Department to deviate from its longstanding procedural rule allowing a party to mark and move discovery responses into evidence. The underlying basis for this approach -- the development of a full and complete record which best serves the Department in deciding the case -- is no less important and immediate in this proceeding. Explicit recognition of this procedural rule will prevent any possibility of undue prejudice, and will put all parties on notice that all discovery responses, absent an appropriate sustained objection, may properly be marked as exhibits and moved into the record as evidence.

Verizon MA requests that the Department follow its usual practice for the identification and entry of evidence in this case and permit the admission of all discovery responses into the record of this case, absent the granting of a substantive objection.

Respectfully submitted,

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